



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF GRANTED IN PART: November 28, 2011

CBCA 2498

CTI GLOBAL SOLUTIONS, INC.,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Lawrence P. Block of Stinson Morrison Hecker LLP, Washington, DC, counsel for Appellant.

Robert D. English, Office of the General Counsel, Federal Bureau of Investigation, Department of Justice, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **SOMERS**, and **POLLACK**.

DANIELS, Board Judge.

CTI Global Solutions, Inc. (CTI) appeals a decision of a Federal Bureau of Investigation (FBI) contracting officer. The contracting officer denied a claim by CTI under purchase orders for the provision of services to her agency under a General Services Administration (GSA) schedule contract.

The basis of the claim, according to the complaint, is that “CTI is entitled to an equitable adjustment for the GSA rates it should have received under the Contracts if the GSA had properly, and timely, approved CTI’s increased rates.” The contractor maintains that “[f]rom October 2007 to July 2010, GSA failed to properly process CTI’s request to

update pricing.” CTI asserts that it is entitled to be paid for its services at the rates it would have charged if GSA had promptly approved its request for increased rates. CTI says that it is also entitled to be paid the equivalent of the increase in the health and welfare benefits mandated by Department of Labor (DOL) wage determinations.

The FBI asks the Board to dismiss the appeal in part for failure to state a claim, and to deny the remaining part of the case on motion for summary relief. According to the agency, the contractor offered and the agency accepted certain rates on three separate occasions, so those are the rates at which CTI should have been – and was – paid. Further, the agency maintains, each purchase order included the wage determination which was current at the time, and the contractor did not until the penultimate day of the contractual relationship assert that the determinations should have any pricing implications.

We grant summary relief for the agency as to most of the issues raised.

Background

GSA maintains a Schedules Program (also known as a Multiple Award Schedule Program). This program “provides Federal agencies with a simplified process for obtaining commercial supplies and services at prices associated with volume buying. Indefinite delivery contracts are awarded to provide supplies and services at stated prices for given periods of time.” 48 CFR 8.402(a) (2007).¹ Agencies may place orders against the contracts – at the listed prices or (as discussed more fully below) at discounted prices. *Id.* 8.404(b), (d).

In 2008, the FBI requested quotations from holders of GSA schedule contracts for the provision of clerical and records management services in Alexandria, Virginia, which is located in the Washington, D.C., metropolitan area. On August 11, in an amendment to the request for quotations (RFQ), the FBI directed interested contract holders to “provide a pricing table for proposed labor categories for performance of such services.”

CTI, the holder of a GSA schedule contract for temporary administrative and professional services, responded to the RFQ. On September 15, 2008, the FBI issued a purchase order to CTI for the services in question. The purchase order stated, “Reference company’s response to [the RFQ] and revised pricing dated 9/12/2008.” The pricing

¹ We cite to the version of the Code of Federal Regulations which was in effect when the contractual arrangements between the parties began. The cited provisions remained unchanged throughout the period discussed in this decision.

proposal showed a billable rate for each of three occupational categories – \$45 per hour for Program Manager (Systems Analyst III), \$29 per hour for General Clerk III (Top Secret), and \$24 per hour for General Clerk II (Secret). CTI’s president acknowledged acceptance of the terms and conditions of the order. At the time, CTI’s schedule contract included the following billable rates for the occupational categories in question in the Washington, D.C. metropolitan area: \$48.07 per hour for Systems Analyst III, \$30.41 per hour for General Clerk III, and \$25.58 per hour for General Clerk II.

The Service Contract Act of 1965, 41 U.S.C. §§ 351-357 (2006) (now 41 U.S.C.A. §§ 6701-6707 (West. Supp. 2011)), mandates that under certain contracts with federal government agencies, contractors must pay at least the wages and fringe benefits determined by the DOL to be appropriate. CTI’s schedule contract expressly stated that it was subject to that Act. The FBI’s 2008 purchase order said that DOL’s wage determination 05-2103, revision 6, dated May 29, 2008, was applicable. This wage determination showed minimum wage rates for numerous occupations in the District of Columbia and nearby jurisdictions, including Alexandria, Virginia. It stated, “ALL OCCUPATIONS LISTED ABOVE RECEIVE THE FOLLOWING BENEFITS: HEALTH & WELFARE: \$3.24 per hour.”

On September 24, 2009, the FBI issued modification 1 to the purchase order, continuing CTI’s work for another year, through September 26, 2010. Pricing was “based on pricing from [the 2008] RFQ.” CTI’s president acknowledged receipt of the modification on the next day. Attached to the modification was DOL wage determination 05-2103, revision 8, dated May 26, 2009. This document, like revision 6, specified minimum wage rates for numerous occupations in locations including Alexandria, Virginia, and said that individuals with those occupations would receive health and welfare benefits. Revision 8 specified that those benefits would be \$3.35 per hour.

On June 22, 2010, GSA and CTI agreed to modification 7 to CTI’s schedule contract. Modification 7 stated, among other provisions, “All previous Wage Determination[s] are hereby deleted in their entirety and replaced with Wage Determination Number 2005-2103, Revision 8 dated, 05/26/2009. . . . This contract is modified based on the following price proposal: CTI Global Solutions Inc’s Pricing Spreadsheets, dated June 17, 2010.” The pricing included rates of \$66.66 per hour for Systems Analyst III, \$38.40 per hour for General Clerk III, and \$32.25 per hour for General Clerk II.

On September 24, 2010, the FBI issued modification 2 to the purchase order, extending the period of performance until December 1, 2010.² Modification 2 stated, “Pricing shall remain the same. The applicable and updated Service Contract rates are applicable and incorporated. Pricing for this extension shall be based on pricing from [the 2008] RFQ.” Attached to the modification was a cost proposal from CTI showing the same billable rates that had appeared on the September 2008 purchase order.

On November 30, 2010, CTI’s president wrote to the FBI contracting officer, seeking an equitable adjustment in the contract price, “as stipulated by our GSA Federal Supply Schedule.” The president said that the billing rates it included in its initial proposal were “based on its GSA Schedule approved rates [W.D. #052103, Revision 4, 7/5/2007 which included a Health and Welfare rate of \$3.16 [per hour].” She maintained that although wage determinations requiring payment of health and welfare benefits in excess of \$3.16 per hour were included in FBI purchase orders, “CTI could not bill the [higher rates] due to [those rates] not being approved per our GSA Schedule.”

On February 10, 2011, CTI sent to the FBI contracting officer a certified claim, asserting that the contract price should be adjusted “to allow for the required updates to CTI’s approved rates.” The claim was in the amount of \$2,334,008.54 and had three components: under the purchase order for the period from September 22, 2008, to September 30 [sic], 2009, \$1,228,350.05; under the purchase order for the period from September 27, 2009, to September 26, 2010, \$1,015,931.61; and under the purchase order for the period from September 30 to December 1, 2010, \$89,726.88.

The contracting officer denied the claim by decision dated April 18, 2011. She noted that “[p]ricing for the original task order was negotiated prior to award and the terms and conditions of CTI’s GSA Schedule Contract . . . were incorporated. Pricing for the final two task orders was based on CTI’s original proposal. Each task order, inclusive of its respective pricing, was acknowledged by [CTI’s president].”

CTI’s assertion that it could not bill for higher health and welfare benefits in excess of \$3.16 per hour because those rates were not approved for its GSA schedule contract is based on a July 27, 2010, letter from GSA contracting officer Larry Mathias to CTI’s president. According to this letter:

² The modification specifies an end date of December 1, 2011, but the accompanying purchase order specifies in two places December 1, 2010, and an e-mail message from the FBI contracting officer to CTI’s president says that the purchase order “will provide funding through 12/01/2010.”

From October 2007 until April 2009, [CTI's GSA schedule] contract was assigned to a Ms. Natalie Chaney for administration. At that time, requests were submitted to . . . update pricing due to changes in Wage Determinations. . . . These modification requests . . . were not processed by Ms. Chaney.

. . . .

Failure to process pricing update requests from October 2007 until May 2010 was not the fault of the contractor, as requests were properly submitted but never processed. However, despite this failure, any required changes in pricing due to changes in Wage Determinations would be covered under FAR [Federal Acquisition Regulation] Part 22, section 22.10, paragraphs 22.1007 and 22.1015. These paragraphs require the Contracting Officer to equitably adjust the contract to allow for required updates in Wage Determination revisions.

At some time prior to June 15, 2011, CTI's president contacted the GSA Office of Inspector General (OIG) regarding the matter discussed in Mr. Mathias' letter. The OIG asked the commissioner of GSA's Federal Acquisition Service (FAS), which administers the schedules program, for comments. On July 12, 2011, the commissioner provided the following report: On September 21, 2007, CTI requested pricing increases based on wage determination increases. On October 18, 2007, CTI's contract was modified to incorporate the increases which had been sought. In July 2008, CTI made an electronic submission to GSA, asking that its schedule contract prices be updated. By e-mail message sent on July 29, 2008, by Ms. Chaney to CTI, the submission was rejected for the following reason:

Text file does not reflect the correct Hourly Bill Rates, Positions and Locations as currently approved in the contract under Modification A005 signed by GSA's Contracting Officer on October 18, 2007. Use the information from Modification A005 to update the text file and re-submit in accordance with the instructions shown below.

The FAS commissioner concluded that "GSA responded timely to CTI's request for price increases." He also stated:

Rates are effective the date modifications are signed and cannot be applied retroactively. It is the obligation of the contract holder to notify federal customers of changes in DOL rates and provide documentation, including modifications to the contact [sic], to support billing discrepancies.

Discussion

The material facts in this case are uncontested. The parties have very different views, however, as to the legal import of these facts.

Our view of the case is for the most part in line with the FBI's. Under the Federal Acquisition Regulation, services offered in a firm's GSA schedule contract are listed at fixed hourly rates, but "ordering activities may seek additional discounts before placing an order." 48 CFR 8.404(d). Thus, the rates to be paid by agencies which place orders against a schedule contract may be, but are not necessarily, the rates listed in that contract. Indeed, that is what happened here. On each of three occasions, CTI and the FBI agreed that the rates at which the agency would pay for the contractor's services were discounted from the rates in the contractor's schedule contract. The FBI issued a purchase order, specifying the rates which would be paid, and CTI acknowledged receipt of the order and made no objection to those rates. Consequently, whether GSA was dilatory in processing a request for increased schedule contract rates or not has no bearing on the outcome of this case.³

With regard to the wage determination adjustment matter, we note that each of the purchase orders cites as applicable a particular DOL wage determination which specifies health and welfare benefits. There is no dispute that each of these determinations was appropriately included in the orders, or that CTI paid its employee the required benefits. CTI's billable rates – the rates prescribed in the orders – were based on a number of factors, including wage rates, health and welfare benefit rates, GSA's industrial funding fee, and whatever else the contractor chose to include. (The exhibit included with the opposition to the motion includes markups for vacation, holiday, other fringe benefits, overhead, general and administrative expenses, profit, and the industrial funding fee.) Prior to the inception of each purchase order, CTI chose, knowing the health and welfare benefits mandated by the applicable wage determination, to charge the FBI certain billable rates for its services. If the

³ CTI's presentation is confusing as to the contractor's desire for increased rates under its schedule contract. The complaint mentions "request" in the singular and alleges that from October 2007 to July 2010, GSA failed to process it. In responding to the FBI's motion, however, the contractor asserts that it made two price increase requests, and that the second, "which forms the basis of the equitable adjustment request, is attached as Exhibit B." Exhibit B to the opposition includes a reference to wage determination 05-2103, revision 8, dated May 26, 2009. We do not understand whether CTI is alleging that it made one request or two, or how GSA could have failed to process since October 2007 a request which could not have been made before May 2009. Because of the way in which we resolve this case, clarifying this matter is unnecessary.

rates CTI chose to charge did not include an increment for health and welfare benefits which were not included in the rates listed on CTI's schedule contract, that is again immaterial, for the schedule contract rates and the purchase order rates were different.

The only period of time during which a new wage determination might have had any effect on CTI's billable rates was the period between May 26, 2009 (the date of issuance of revision 8), and September 26, 2009 (the end of the 2008 purchase order). At all other times relevant to this dispute, the rates CTI charged were stated *after* the pertinent wage determination had been issued. Revision 8 increased minimum health and welfare benefits from \$3.24 per hour to \$3.35 per hour. Thus, unlike the other wage determinations, which CTI should have considered when formulating its prices, revision 8 imposed an additional government requirement on the contractor after it had formulated its prices.

CTI alleges that it increased payments to employees who worked under the 2008 purchase orders due to issuance of revision 8. We will allow the case to proceed, to the extent that CTI will have an opportunity to prove this assertion. We note, however, that even for this four-month period, "[c]ontracting officers shall ensure that . . . contract unit price labor rates are adjusted only to the extent that a contractor's increases or decreases in applicable wages and fringe benefits are made to comply with the requirements set forth in [certain FAR clauses which implement the Service Contract Act]." 48 CFR 22.1006(c)(1). To prevail, CTI will have to demonstrate not only that it paid the increased benefits mandated by the new wage determination, but also that it was not providing these benefits of its own volition, prior to issuance of the determination.

CTI contends that no case law addresses the matters at issue in this case, and that the FBI cannot meet its burden of demonstrating that it should prevail, "accepting all facts as true in the complaint[,] [b]ecause there is no case law on point." The contractor misstates the standard for evaluating motions for summary relief. Resolution of a dispute on such a motion is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). To defeat a motion for summary relief, the nonmoving party must come forward with specific facts showing the existence of a genuine issue for trial. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Where there are no material facts in dispute, a case is susceptible to resolution on a motion for summary relief, regardless of whether prior case law on point exists.

There are no material facts in dispute here. Even accepting as true CTI's suggestion that GSA's lack of responsiveness to its desire for modification of the schedule contract was the cause of the lack of increased billable rates (including to account for higher health and welfare benefits) in that contract, the contractor cannot prevail as to most of its claim. With the exception of one four-month period, the parties agreed on billable rates which were established independently of CTI's schedule contract rates and in full knowledge of applicable wage determinations. Accordingly, we grant summary relief for the FBI as to all portions of the case except the question whether the eleven-cent-per-hour increase in health and welfare benefits mandated by the Government in wage determination revision 8 should result in increased payments under the 2008 purchase order for the period from May 26 to September 26, 2009.

Decision

The FBI's **MOTION** is **GRANTED IN PART**. As requested by the parties, the Board suspends proceedings for thirty days to allow CTI to present, and the FBI to review, documentation concerning the remaining portion of the case. The parties shall submit a status report on or before the thirty-first day after the issuance of this decision.

STEPHEN M. DANIELS
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

HOWARD A. POLLACK
Board Judge